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Limbo Time? An analysis of whether the limbo argument applies to de facto stateless people in the UK

Nicholas Gore, MA (Sheffield)
(nickjgore@gmail.com)

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REFUGEE LAW INITIATIVE

Human Rights Consortium| School of Advanced Study| University of London
Senate House, Malet Street, London WC1E 7HU, UK
Email: RLI@sas.ac.uk
Telephone: +44 (0)20 7862 8570

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Abstract

The 'limbo argument' suggests that when the chances of removing a refused asylum seeker are remote or irrational, they should be given some form of temporary permission to remain in order to contribute towards society. This argument has been largely rejected and the current system of destitution for refused asylum seekers who cannot be removed, remains. This work draws a parallel between being in 'limbo' and being de facto stateless. It argues that being de facto stateless is a broad term, and goes on to analyse how the European Court of Human Rights and the European Court of Justice have given increased protection to de facto statelessness people. This work then goes on to apply such protection to refused asylum seekers who are in 'limbo', suggesting how such protection can operate in domestic law, and rejecting counter-arguments as to the limbo arguments viability, and flawed policy arguments.

Keywords

Limbo argument, statelessness, de facto statelessness, refused asylum seeker,

Introduction

The Limbo argument:

There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here...¹

The time for the ‘limbo argument’ has come; it should be applicable in UK courts. With the influence of European Court of Human Rights (ECtHR) decisions, European Court of Justice (ECJ) rulings and the UK’s international obligations, it is time to consider the view that the inability to safely return migrants constitutes a form of de facto statelessness; this statelessness should then grant leave to remain for the individual until they can be safely and lawfully returned. The limbo argument is analogous to the de facto stateless protection offered by the above courts, and allows a domestic application of such rulings.

Lady Hale’s one paragraph obiter statement, at the start of this work, has been termed ‘the limbo argument’ to reflect the fact that many individuals who cannot be deported live in a state of anticipation for their removal, and whilst in this position do not have full rights. It has led to arguments that some rights should be available for those granted ‘temporary admission, who have no affirmative right to remain in this country, but cannot, for particular, reasons be removed.’² Such views have been rejected in UK courts,³ and seen as not a ‘live question’.⁴ This work will argue that the limbo argument does bind the UK courts, as an effect of the UK’s obligation to take into account ECtHR rulings and being bound by ECJ decisions, and applies to a wide category of peoples who have been given temporary admission, namely those who are ‘de facto stateless’, that is, stateless in fact rather than law (de jure). The practical consequence of the application of this argument is that those who are de facto stateless should be given leave to remain, until they are no longer de facto stateless.

In this work one group of de facto stateless persons will be studied; refused asylum seekers.⁵ Such persons only have access to minimum rights, such as healthcare, and are refused many more rights such as the right to housing, benefits, and to employment,⁶ often leading to destitution.⁷ It must be noted other groups of persons fall into the category of de facto stateless

¹ *R. v. Secretary of State for the Home Department ex parte Khadir*, [2005] UKHL 39, [Lady Hale], [4].

² *MS, AR & FW v Secretary of State for the Home Department*, [2009] EWCA Civ 1310, [Sedly] [2].

³ See also Lord Doherty, *Judicial Review of a decision of the Secretary of State for the Home Department dated 10 July 2013*, [2014] CSOH 63, in the Scottish Courts.

⁴ *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42, [Beatson], [29].

⁵ The number of Asylum Seekers who have had their grant rejected totalled to 10,994 people in 2013, Home Office, ‘Asylum data tables immigration statistics April to June 2014’, Vol. 1, AS 05, ‘Asylum applications and initial decisions for main applicants by sex and country of nationality’ in *Tables for Immigration Statistics: April to June 2014*, [2014].

⁶ See H. Crawley, J. Hemmings and N. Price, ‘Coping with Destitution Survival and livelihood strategies of refused asylum seekers living in the UK’, *Centre for Migration Policy Research (CMPR)*, Swansea University (2011), https://stillhumanstillhere.files.wordpress.com/2009/01/oxfam_coping_with_destitution.pdf [accessed 05 March 2016], pp. 8-9.

⁷ No centralised data exists as to how many are destitute, however some charities have predicted 30,000- 50,000 may currently be in such a situation, see Leicester Refugee and Asylum Seekers Voluntary Sector Forum, *Destitution in the asylum system in Leicester*, (2009), <https://stillhumanstillhere.files.wordpress.com/2009/06/destitutionintheasylumsystem.pdf> [accessed 09 April 2016], p. 13.

persons, namely terrorists who have had their nationality stripped from them,⁸ which has been analysed in depth elsewhere.⁹

A refused asylum seeker is a migrant who has applied for asylum, has been rejected, and has exhausted all appeals. In theory, refused asylum seekers are liable to be detained or removed to their country of origin when it is convenient for the State to do so.¹⁰ However, many refused asylum seekers are not returned for long periods, often because if deported back to their home State they may face a ‘real risk’ of suffering degrading treatment, breaching the UK’s Article 3 obligations under the ECHR.¹¹ They are then without the full rights of a British citizen, yet cannot be deported until their return destination is deemed safe. Without government support or a means to work, refused asylum seekers are often destitute, often cannot stop their destitution, and yet cannot be deported for years or sometimes decades.¹² During this time their original nationality counts for very little, as most cannot return to their country or origin. Thus from the period these people are refused asylum in the UK until they are to be deported, they are in ‘limbo’.¹³

The UK was chosen for an in-depth study as it is part of the ECtHR, the EU, is a party to the Convention Relating to the Status of Stateless Persons (1954),¹⁴ the Convention of the Reduction of Statelessness (1961),¹⁵ and also has its own individual statelessness procedures.¹⁶ This allows an analysis at three levels, international, regional and domestic, and contributes to fields of scholarship including; the study of statelessness, constitutional law by its examination of ECtHR and ECJ rulings on the UK, and is the first study of its kind to study in-depth the relationship between statelessness and the limbo argument. The practical ramifications of the suggestions in this work, if adopted, will permit refused asylum seekers leave to remain, allowing rights such as housing and the right to work, and reducing destitution. This solution to destitution, and allowing rights for refused asylum seekers, is better than the current available options for such people.

⁸ 27 people since 2010, T. May, ‘Home Secretary Theresa May on counter-terrorism’, *Royal United Services Institute*, Whitehall, London, 24th Nov 2014, <https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism> [accessed 05 March 2016] [25].

⁹ See G. Goodwin-Gill, ‘Deprivation of Citizenship resulting in Statelessness and its Implications in International Law’, *Opinion*, <https://assets.documentcloud.org/documents/1086878/guy-s-goodwin-gill-legal-opinion-on-deprivation.pdf> [accessed 15 April 2016].

¹⁰ Immigration Act, 2014 s.1(1).

¹¹ As established in *Chahal v. United Kingdom* [1996], 23 EHRR 413.

¹² See H. Lewis, ‘Still destitute: A worsening problem for refused asylum seekers’, (2009), *Joseph Rowntree Trust*,

[http://www.jrct.org.uk/userfiles/documents/Still%20destitute%20\(2009%20full%20research%20report\).pdf](http://www.jrct.org.uk/userfiles/documents/Still%20destitute%20(2009%20full%20research%20report).pdf) [accessed 29 April 2016], p. 18.

¹³ British Red Cross, *Not gone, but forgotten: The urgent need for a more humane asylum system*, (2010), <http://www.redcross.org.uk/About-us/Our-advocacy-work/~media/BritishRedCross/Documents/About%20us/Not%20gone%20but%20forgotten%20destitution%20report.pdf> [accessed 09 April 2016], p. 9.

¹⁴ Convention relating to the status of Stateless persons, 1954, ratified on 16/04/1959 with reservations based around right to remove if one is a threat to national security, see United Nations, *Treaty Collection*, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en [accessed 10 March 2016].

¹⁵ Convention of the Reduction of Statelessness, 1961, ratified on the 29/03/1966 with reservations based around rejection of nationality if one has continued assistance from another state, or if one acts against the vital interests of the UK, see United Nations, *Treaty Collection*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en [accessed 10 March 2016].

¹⁶ Immigration Rules, Part 14: Stateless Person.

The first part of this work will examine the theoretical underpinnings of statelessness, the division of this concept into de jure and de facto, and the effects international law has on this area of study. The second section will make the case that ECtHR and ECJ decisions have increased protection for de facto stateless people and will consider their impact on the UK legal system. The third part of this work will detail how the limbo argument could operate, will rebuke criticisms of it, and will argue it is the best case in order to reduce the destitution of asylum seekers. Finally, in the fourth section, this work will consider the effect the limbo argument would have if applied, rebutting arguments such as the ‘pull’ factor and suggesting the economy itself may benefit.

1. Theoretical Underpinnings

1.1 The Limbo Argument in the UK

To understand this argument, one must first look at the case of *Khadir*. An argument was put forth in this case that living for several years with the prospect of removal and without ‘full rights’ such as to employment or full benefits, should allow the granting of the then status ‘exceptional leave to enter’. The UK Supreme Court held that one could be ‘pending to remove’ ‘so long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this.’¹⁷ The time between temporary admission and removal can be seen as ‘limbo’ in which Lady Hale suggested that if there was no remote possibility of return, those within limbo should be allowed to make a ‘proper contribution to society’. In *MS and Others*, Justice Sedley made explicit the link between being in limbo and Article 8 of the European Convention of Human Rights, and argued that leave to remain may be granted on a case by case basis if Lady Hale’s conditions have been met.¹⁸ The link between limbo and Article 8 was supported by such cases as *Tekle* in which denying the right to work for applicants who have to wait a ‘substantial’ period of time was deemed to breach Article 8.¹⁹

However, *Abdullah* seems to pour cold water over Justice Sedley’s slight advance in developing the limbo argument by first claiming it is not a ‘live’ question, and then considering that if it were, it would depend on the ‘co-operation’ of the individual to obtain documentation.²⁰ Lord Beatson, in *Abdullah*, also argued it may be analogous to the rules surrounding length of time in detention, such as excessive lengths of time in detention when there is little prospect of removal is unacceptable.²¹

It is the task of this work to suggest that the time for the limbo argument has come by the ‘back door’. It will be argued that being in ‘limbo’ is the same as being de facto stateless, and the ECJ and ECtHR have given greater protection to those who are in such a position. Under the Human Rights Act (1998) the UK courts have to ‘take into account’ ECtHR decisions,²² and under the European Communities Act (1972),²³ in conjunction with EU

¹⁷ *Khadir* [Lord Brown] [32].

¹⁸ *MS*, [Sedly] [27-30].

¹⁹ *Tekle v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin) [Blake] [40].

²⁰ *Abdullah* [Beatson] [28-9].

²¹ *Ibid*, see *R (MH) v SSHD* [2010] EWCA Civ 1112 at [44] and [68(iii)] , [Richards LJ], where co-operation with the gathering of country of origin information is also a factor in determining detention length, as is excessive lengths of time in detention when there is little prospect of removal.

²² Human Rights Act, 1998, s. 2(1), often the courts do take account of ECtHR rulings as if they do not applicants may appeal to the Strasbourg court, costing time and money and circumventing Parliament’s intent in wanting a UK appeal system for ECHR rights, hence the enactment of the HRA, see Home Office, *Rights Brought Home: The Human Rights Bill* (White Paper, CM 3782, 1997).

²³ European Communities Act, 1972, s.2(1).

treaties,²⁴ the ECJ case laws are binding, although there is debate about this topic.²⁵ Such courts having an influence on the UK, the UK Court should take ECtHR rulings into account and follow ECJ rulings in the development of de facto stateless protection.

1.2 Statelessness and Nationality

Statelessness as a theoretical concept links explicitly to nationality.²⁶ The evolution of the concept owes much to Hannah Arendt and her argument that nationality allows the 'right to have rights', and that rather than the 'inalienable' status of rights, when one has no nationality 'he has lost the qualities which make it possible for other people to treat him as a fellow man.'²⁷ Her argument is that States have created a system of rights and duties based around nationality in order to regulate borders, and thus when one does not have a nationality they are an 'anomaly.'²⁸ This means they are outside of the system, unprotected and 'right-less.'

Arendt wrote in the aftermath of the Second World War, when statelessness was rampant, with no legal protection to those who were in such a position. Since then, there have been two conventions to help protect those who are stateless,²⁹ and a division of who Arendt called stateless, into refugees and stateless, the former fleeing persecution.³⁰ However Arendt's critique has been argued to still exist, for instance Agier examines how stateless peoples are seen as not possessing any political existence, only a 'biological one' in relation to the basic humanitarian aid many receive.³¹ Such arguments point out that full 'universal rights' are still dependant on a State, and hence nationality is often a prerequisite.

One reason for rights remaining dependant on nationality has a psychological undertone- because those who are stateless are seen as 'the other',³² linking to a theory from Edward Said.³³ This theory suggests that the 'self' (in this case, the national) seeks to portray the 'other' (the non-national) as the embodiment of everything the 'self' is not. This allows the 'self' to better understand its own identity whilst attributing many negative characteristics to the 'other',³⁴ allowing the 'other' to be seen as 'troublesome' and justifying legal actions against them.³⁵

²⁴ In particular see Treaty on the Functioning of the European Union, 2007, s. 258.

²⁵ The debate around this topic which will not be included in this work for lack of space, see however G. Mikelsone, 'The Binding force of the Case Law of the Court of Justice of the European Union', (2013), *Jurisprudence*, 20(2), pp. 469- 495.

²⁶ Defined in the *Nottebohm case (Liechtenstein v. Guatemala)* [1955] ICJ 1, as 'A legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties...', p 23.

²⁷ H. Arendt, *The Origins of Totalitarianism*, (3rd edn, Allen & Unwin, 1967), p.300.

²⁸ R. Jennings, 'Some International Law Aspects of the Refugee Question', (1939), *British Year Book of International Law*, Vol. 20, p. 110.

²⁹ Convention Relating to the Status of Stateless Persons, 1954 and The Convention of the Reduction of Statelessness, 1961.

³⁰ Convention relating to the Status of Refugees, 1951, Article 1(1).

³¹ M. Agier, *On the Margins of the World: The Refugee Experience Today*, (Polity Press, 2008), p. 49.

³² For instance see L. Kerber, 'Toward a History of Statelessness in America', (2005), *American Quarterly Review*, 57, 727.

³³ E. Said, *Orientalism*, (Routledge & Kegan Paul, 1978).

³⁴ A. Padilla, 'Social Cognition, Ethnic Identity and Ethnic Specification Strategies for coping with threat due to Prejudice and Discrimination', in Willis- Esqueda, C., (ed.), *Motivational Aspects of Prejudice and Racism*, (Springer, 2008) p. 25.

³⁵ R. Jenkins, 'Categorization: Identity, Social Process and Epistemology', *Current Sociology*, (2000), Vol. 48, No. 7, p 19.

Thus the regulation of borders is in part to regulate the limit to the ‘space’ which the ‘self’ claims. As a State’s main function is, arguably, to keep security within its borders and exclude the interference of other States, the existence of borders is understandable.³⁶ However, it can be argued that there are ‘multiple’ or ‘layered’ borders in the sense that groups may experience different barriers to the State at different points,³⁷ for instance the availability of welfare.³⁸ In the UK this does not apply to those who are nationals, their access to the State is largely unfettered.

Combining the ideas of borders as a controlling mechanism and the concept of the ‘other’, a system emerges that is often harsh. The key area such ‘harshness’ takes place is in the area of welfare. Stateless persons in the UK are refused access to much of the welfare state and refused asylum seekers in particular are not given access to social housing, unemployment benefits, education funding or allowed to work.³⁹ These constrictions are part of a culture designed to make their stay ‘both unpleasant and short’,⁴⁰ and to deter future arrivals from coming at all. One reason for this policy is to ensure that the State is not seen as too generous, or else they will be seen siding with ‘the other’, the non-national, against ‘the self’, the national.

This leads into a discussion about the limits of nationality and nationality within a host State. As this concept endows one with rights, whilst non-nationals have lesser rights, it has been compared to a feudal class privilege system,⁴¹ and indeed by using nationality as an internal border the State is denying a class of people privileges.⁴² This is an area often understudied both in law and philosophy as there has been a preoccupation with ‘the ethics of admission’⁴³ and an ignorance of the ethics of internal borders. This means the lack of ‘effective nationality’ has also been understudied, a point that is key to this work.⁴⁴

If nationality is ‘the right to have rights’, then for refused asylum seekers, returning back to a State where they fear they may face persecution, imprisonment or death would be to have all, or almost all, of their rights as unprotected. But in their host State, they cannot access the rights of citizens of the UK, making them ‘precarious residents’,⁴⁵ as they have less protection than UK citizens and their residency in the State is under threat. Therefore, refused asylum seekers, in a state of limbo, have a nationality that is not effective, as returning to their home State would only lead to the abuse of their rights not the ‘right to have rights’. But they

³⁶ See commentary over the *Peace of Westphalia* (1648), for instance J. Solana, ‘Securing Peace in Europe’, *NATO*, 12 Nov. 1998, <http://www.nato.int/docu/speech/1998/s981112a.htm> [accessed 03 March 2016].

³⁷ A. Kesby ‘The Shifting and Multiple Border and International Law’ *Oxford Journal of Legal Studies*, (2007), 27, p. 101.

³⁸ A. Kesby, ‘Internal borders and immigration control: new prospects and challenges’, *European Human Rights Law Review*, (2010), 2, pp. 176–191.

³⁹ See Salford City Council, *Asylum seekers: some myths and truths...*, (1 October 2015), Support and advice, <https://www.salford.gov.uk/asylum-myths.htm> [accessed 24 March 2016].

⁴⁰ P. Hynes, and R. Sales, ‘New Communities: Asylum Seekers and Dispersal’, in A. Bloch and J. Solomos, (eds.), *Race and Ethnicity in the 21st Century*, (Palgrave Macmillan, 2010), p. 39.

⁴¹ J. Carens, *The Ethics of Immigration*, (OUP, 2013), p.137.

⁴² See W. Wright, ‘Hannah Arendt and Enemy Combatants: New Implications of Statelessness.’ (2008), *Annual meeting of the Midwest Political Science Association, Chicago*, http://research.allacademic.com/meta/p_mla_apa_research_citation/1/3/8/0/5/p138056_index.html [accessed 15 March 2016], p. 22 for an analysis of the right to property.

⁴³ S. Parekh, ‘Beyond the ethics of admission: Stateless people, refugee camps and moral obligations’, (2014), *Philosophy and Social Criticism*, Vol. 40(7) 645–663

⁴⁴ Different from the concept of ‘effective nationality’ in *Nottebohm* [21] which argued that an individual with two nationalities has ‘effective nationality’ with the State he had more links with.

⁴⁵ M. Gibney, ‘Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens’, (2009), *Munich Personal RePEc Archive*, Paper No. 19190, p.10

also suffer the limitation of rights, normally associated with nationality, in their host State. This is due to a strict control on internal state borders, motivated by a fear of the 'other'. Thus refused asylum seekers are stateless as they do not have an effective nationality.

1.3 Statelessness in International Law

Arendt's criticisms were partially addressed by the UN in the Convention Relating to the Status of Stateless Persons (1954).⁴⁶ Appreciating that not all stateless people would be refugees, and so were in need of additional protection, this Convention itself was supposed to be a 'gap filler'.⁴⁷ Again, as a State's sovereignty is largely reflected in its borders, the definition of one who is stateless and thus needs State protection was given a wide remit so that States themselves could decide it. Thus the following rather vague definition of a stateless person was given:

*For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.*⁴⁸

'Operation of its law' immediately appeals to States as their law defines who can be stateless- such people would be 'de jure stateless'. States can use the law to give a broad or narrow view of what is considered statelessness, but either way this status also requires evidence to 'prove a negative', an often impossible task that has wide discrepancies over what counts as confirmation of such statelessness. Some commentators for instance have argued a voting record can count as proof of nationality.⁴⁹ However, the UNHCR itself admits one who may be considered stateless in one country, may not be in the next.⁵⁰ This suggests disagreement over what does count as evidence, for instance a voting record can be largely informal in some States and not in others. Statelessness in practice therefore is incredibly hard to prove.

1.4 De Facto Statelessness

If one is found not to be stateless by the above definition, they may be seen as 'de facto' stateless. There are different definitions for de facto statelessness, some arguing that it includes the individual having a nationality according to the law, but that nationality is ineffective or does not offer protection.⁵¹ However such a definition jars against Article 1 of the Convention as it ultimately allows one State to deem the nationality of another 'ineffective', an affront to the applicant's State sovereignty.⁵² Apart from allowing States the use of value systems to judge legal matters, the strict legal separation between de jure and de facto stateless does not reflect the reality that both sects of people have similar protection needs and are indeed in similar circumstances, including inability to return.⁵³ Some have argued that this means the definition has broken down and instead of such a definition 'a more pragmatic approach may

⁴⁶ Convention relating to the status of Stateless persons, (1954).

⁴⁷ See Pill LJ in *Revenko v Secretary of State for the Home Department* [2000] EWCA Civ 500.

⁴⁸ Article 1, Convention relating to the status of Stateless persons, (1954).

⁴⁹ P. Weis, *Nationality and Statelessness in International Law*, (Kluwer Academic Publishers Group, 1979), p. 215.

⁵⁰ UNHCR and IPU, *Nationality and statelessness. A handbook for parliamentarians*, (2005), http://www.ipu.org/pdf/publications/nationality_en.pdf [accessed 03 March 2016], p. 20.

⁵¹ See D. Weissbrodt, C. Collins, 'The Human Rights of Stateless Persons', (2006), *Human Rights Quarterly*, Vol. 28, No. 1, p. 251 and H. Massey, 'UNHCR and de facto statelessness', (2010), *Legal and Protection Policy Research Series*, LPPR/2010/01, <http://www.unhcr.org/4bc2ddeb9.html> [accessed 05 March 2016] p. 61.

⁵² A. Harvey, 'Statelessness: The 'de facto' Statelessness Debate', (2010), *Immigration, Asylum and Nationality Law*, Vol 24, No 3, p. 259

⁵³ *Ibid*, p.262.

be to identify different scenarios which amount to de facto statelessness...⁵⁴ It is in such a broad definition of statelessness that this work shall contribute, suggesting that the inability to return an individual amounts to de facto statelessness due to an ineffective nationality. (Resolution)

The existence of de facto statelessness itself is a criticism of the international law surrounding this topic. Surely, if one is not stateless under the Convention, then they have a nationality and hence rights? But obviously this is not the case. The legal definition of statelessness does not reflect reality and so in effect de facto statelessness is the last crack through which people without effective rights and nationality fall. This can be seen as deliberate in order to limit the number of applicants who applied for such statelessness protection. Evidence of this can be seen by the rigorous rebuke against the suggestion that the Final Act of the United Nations Conference on the Status of Stateless Persons (1954), protects those who are de facto stateless. There is an argument that the Final Act implicitly protects those who are de facto stateless by recommending when a State ‘recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons.’⁵⁵ Some international bodies associated this explicitly with those who are de facto stateless,⁵⁶ although it must be pointed out ‘recommends’ and ‘sympathetically’ are not legally obliging terms, despite the importance of the Convention itself. Even so this has been largely ignored by States who argue that ‘from the wording and the nature of the clause, the state is free to decide when the reasons are valid and, if so, whether it wishes to accord to a particular person... the rights under the Convention.’⁵⁷ As there have only been sixteen successful applicants to be recognised as de jure stateless,⁵⁸ there is clearly little appetite in the UK to be ‘sympathetic’ to such people potentially because they would be delivering the ‘other’ into their society, and so the internal borders are maintained.

De facto statelessness covers a broad range of people and situations and any definition cannot include all people who are not de jure stateless. Thus, this work will view those that are not de jure stateless as de facto stateless. This broad remit allows refused asylum seekers within the de facto stateless field and attempts to be as inclusive as possible. Doing so attempts to stop what Ardent discussed over sixty years ago, the ignorance of statelessness by a lack of discussion about de facto statelessness, a ‘core concept’.⁵⁹ The ultimate form of recognition for

⁵⁴ The Equal Rights Trust, *Legal Working Paper: The Protection of Stateless Persons in Detention under International Law*, (2009), Project “Stateless Persons in Detention”, <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Legal%20Working%20Paper.pdf> [accessed 05 March 2016], p.6.

⁵⁵ UNHCR, *Final Act of the United Nations Conference on the Status of Stateless Persons*, (1954), <http://www.ehu.eus/ceinik/tratados%5C16TRATADOSOBREREFUGIADOS%5C161RefugiadosApatridasyAsilo%5CTR1615ING.pdf> [accessed 05 March 2016], p. 3.

⁵⁶ UNHCR, *Information and accession package: the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness*, Geneva, (January 1999), <http://www.refworld.org/pdfid/3ae6b3350.pdf> [accessed 05 March 2016], p. 13 see also UNHCR and IPU, *Nationality and statelessness* p. 25.

⁵⁷ N. Robinson, ‘Convention relating to the status of stateless persons - Its history and interpretation’, (1955), UNHCR, Geneva, <http://www.refworld.org/pdfid/4785f03d2.pdf> [accessed 05 March 2016], p. 12.

⁵⁸ Between 2013-4 783 people applied in the UK and 16 were granted statelessness, see European Migration Network and European Commission, *Ad-Hoc Query on recognition of stateless persons*, Requested by LU EMN NCP on 26th February 2015, Compilation of 4th May 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2015.675_lu_recognition_of_stateless_persons_wider_diss.pdf [accessed 05 March 2016], p. 47.

⁵⁹ H. Ardent, *Origins*, p. 279.

such a status would be to allow them leave to remain, as the limbo argument attempts to do, granting rights such as employment and benefits.

Interestingly it can be said that the de jure definition of statelessness is a customary international legal term.⁶⁰ As customary laws and treaty interpretations can change evolutively,⁶¹ based on changing political circumstances,⁶² then the practical effects of de facto statelessness may change the scope of de jure statelessness. This may come about due to the increased rights given to de facto stateless peoples (as this work will show), meaning that having a distinction between de jure and de facto statelessness would be arbitrary as both would have the same implicit legal rights (or lack of rights) due to their statelessness, be it de jure or de facto. However this work does not suggest de jure and de facto are the same now, it only contributes to the evolutive approach by suggesting that de facto stateless should be given leave to remain, one particular status that is the same as those who are de jure stateless in the UK.⁶³ It does suggest however that de facto stateless cannot be narrowly defined, and can only be understood by analysing the scenarios which can create de facto statelessness.

⁶⁰ International Law Commission, *Articles on Diplomatic Protection with commentaries*, (2006), A/61/10, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf [accessed 03 March 2016] pp. 48-9.

⁶¹ S. Helmersen, 'Evolutive treaty interpretation: Legality, Semantics and Distinctions', (2013), *European Journal of Legal Studies*, 6, 127.

⁶² See M. Milanovic, 'The ICJ and Evolutionary Treaty Interpretation', (2009), *EJIL: Talk!*, <http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/> [accessed 11 April 2016] for a general discussion about the evolutive approach to international law.

⁶³ Home Office, *Asylum Policy Instruction Statelessness and applications for leave to remain*, (2016), p. 5.

2. Statelessness and Europe

This section will examine the developing ECtHR and ECJ rules around statelessness and how this may be used to protect those who are de facto stateless. It must be noted that such obligations make the limbo argument stronger, as applying the limbo argument will fulfil the case law obligations discussed below. Three cases are particularly focused on, *Kuric and Others v Slovenia*,⁶⁴ and *Genovese v Malta*,⁶⁵ both ECtHR cases, as well as the *Rottmann* case from the ECJ.⁶⁶ These cases have this biggest effect on de facto statelessness protection, with *Genovese* and *Rottmann* being well studied, whilst *Kuric* has been largely ignored by academics. However, none of these cases have been studied with the intent to further the domestic ‘limbo argument’, making this analysis unique.

2.1: The European Court of Human Rights

There have been many articles written about the ‘interpretive obligation’ of ECtHR rulings made in s.2 of the Human Rights Act 1998.⁶⁷ Discussion of this subject in detail is outside of the parameters of this work,⁶⁸ however it is argued that although UK courts do not always consider such an ‘obligation’ as law,⁶⁹ the courts normally apply ECtHR rulings.

Much of the study on the ECtHR and statelessness has largely focused around determining de jure statelessness.⁷⁰ Such works are useful as they highlight fundamental problems in the assigning of statelessness status and broaden the scope of what is de jure statelessness, allowing more to fall within this category. However as suggested above, the division between de jure and de facto statelessness does not reflect reality, of law or society, and can be harmful. Thus this work studies the protection that can be given to de facto stateless rather than expanding the arbitrary application criteria that is ‘de jure’ statelessness. In undertaking such an endeavour, this work uses many of the same sources as those who wish to expand the scope of de jure stateless, but with a different interpretation.

Suggesting rights and protections for de facto stateless people, deprived of both for so long, is a controversial step and leads to questions about feasibility compared to expanding de jure stateless as an established legal route. The work of academics who study such issues should be applauded for their attempts to protect more vulnerable people.⁷¹ If such works were adopted these would allow many more people to be granted the status of stateless. But at present there is a hostile environment in allowing more immigrants and asylum seekers into the country.⁷² It

⁶⁴ *Kuric and others v Slovenia*, (2012), ECtHR, Application no. 26828/06.

⁶⁵ *Genovese v Malta*, (2012), ECtHR, Application no. 53124/09.

⁶⁶ *Janko Rottmann v Freistaat Bayern*, (2010), ECJ, C-135/08.

⁶⁷ Human Rights Act, 1998.

⁶⁸ See however, Lord Irvine, ‘A British Interpretation of Convention Rights’, Bingham Centre for the Rule of Law, (14th December 2011), UCL Judicial Institute < [http://www.ucl.ac.uk/laws/judicial-institute/files/British Interpretation of Convention Rights - Irvine.pdf](http://www.ucl.ac.uk/laws/judicial-institute/files/British%20Interpretation%20of%20Convention%20Rights%20-%20Irvine.pdf)> [accessed 22 March 2016], p. 9, and A. Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’, (2004) 24, *Oxford Journal of Legal Studies*, p. 264.

⁶⁹ See *R v Horncastle and others*, [2009], UKSC 14, [11] (Lord Phillips).

⁷⁰ See C. Vlieks, *A European Human Rights Obligation for Statelessness Determination?*, (2013), Master’s thesis, Tilburg Law School.

⁷¹ See C. Vlieks, *A European Human Rights Obligation for Statelessness Determination?*, and L. van Waas, ‘Fighting statelessness and discriminatory nationality law in Europe’, (2012), *European Journal of Migration and Law*, 14(3).

⁷² S. Blinder, ‘UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern’, (2015), *The Migration Observatory*, <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Public%20Opinion-Overall%20Attitudes%20and%20Level%20of%20Concern.pdf> [accessed 22 March 2016].

thus seems improbable that the government would give a generous definition of statelessness at this time. Instead this work suggests that the UK is currently in breach of its obligations, and thus this work hopes to force the State to act for de facto stateless rather than suggesting it might.

It must be noted before proceeding further that there is no ‘right to nationality’ within the European Convention on Human Rights, and indeed the UK is not a party to the European Convention on Nationality (1997),⁷³ which prohibits discrimination in nationality laws and limits when nationality can be removed. It could be argued that this reduces the impact of any argument that the UK has an obligation to ensure rights for those who are de facto stateless. However, this work will argue that the cases below create stronger rights than those within the Convention on Nationality in any case, and these cases combined can be seen as the ECtHR’s interpretation of a right to nationality.

2.1.1: Development of protection for de facto Stateless

This section will briefly discuss the historical case law before studying the more recent and important cases surrounding the protection of de facto stateless people. This then allows a narrative to expose the increasing protection such people have received.

The first case to discuss is that of *Karashev and family v Finland*,⁷⁴ when, the host country, after denying citizenship, was put under an ‘Article 8 test’ whereby the Court looked ‘on the one hand at whether the denial of nationality itself must be deemed arbitrary and, on the other hand, at whether the consequences of the denial of nationality were arbitrary.’⁷⁵ Neither of the two tests were satisfied in that case, however, the admission that it is not simply the act of denying nationality but the consequences such an action has, is important for the linking of nationality and statelessness. The consequences of a lack of nationality can be observed with the group under study in this work, the result of de facto statelessness being destitution.

Slivenko v Latvia is a case studied in detail by academics.⁷⁶ It suggested that being made stateless can cause a State to violate Article 8. This expansion of Article 8 was notable at the time and seen largely as the ECtHR expanding its power to protect illegal entrants,⁷⁷ going against previous case law suggesting that the power of expulsion was only for the State.⁷⁸ This was seen as the extension of the term ‘private life’ under Article 8,⁷⁹ confirmed in later cases where private life was found to be violated by deportations even when there had been no effects to family life.⁸⁰ Thus this case is the basis for many other ECtHR decisions (including *Genovese*) involving private life and deportation, and is essential to this work.

To ensure that an individual’s private life was not engaged the State would have to assess the individual’s statelessness, and determine whether they are de jure stateless. Hence the preoccupation of academics to further this definition and allow more cases within the de

⁷³ European Convention on Nationality, 1997, (No. 166).

⁷⁴ *Karashev and Family v. Finland*, (1999), ECtHR, Application no. 31414/96.

⁷⁵ L. van Waas, ‘Fighting statelessness and discriminatory nationality law in Europe’, p. 252.

⁷⁶ *Slivenko v. Latvia*, (2003), ECtHR, Application no. 48321/99.

⁷⁷ D. Thym, ‘Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?’, (2008), *International & Comparative Law Quarterly*, 57(1), p. 100.

⁷⁸ *Moustaquim v Belgium* [1991], ECHR, No 12313/86, [43].

⁷⁹ Y. Ronen, ‘The ties that bind: family and private life as bars to the deportation of immigrants’, (2012), *International Journal of Law in Context*, 8(2), p. 290

⁸⁰ *Sisojeva et al v Latvia*, [2007], ECHR, Application No. 60654/00.

jure statelessness category, and states increasingly allowing a stateless identification procedure, as the UK has.

2.1.2: *Genovese v Malta*

This case is often seen as the seminal one for discussion over nationality and statelessness,⁸¹ as it focuses on the denial of nationality and the effects this has. Although this work is not advocating that refused asylum seekers should receive a nationality, it can be contended that being in limbo makes their nationality ineffective, and thus deprives them of an effective nationality. This would be a breach of ECHR rights (as will be discussed) and allowing leave to remain could avoid breaching such rights.

In this case, the applicant was refused Maltese nationality because he was born out of wedlock. This did not leave the applicant stateless, and he could still go to Malta as an EU citizen, though only for a limited period of time. It was argued that as a national he could spend unlimited amounts of time there and thus be able to establish a better ‘family life’ with his father.⁸² The Court held that Maltese law did discriminate against him (in violation of Article 14), under Article 8 grounds. The Court then gave a passage that is worth quoting in full and many academics argue makes nationality an attribute of Article 8:

*‘The denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that Article.’*⁸³

This has been seen as confirming the applicability of Article 8 to nationality deprivation or denial,⁸⁴ entrenching nationality into Article 8 jurisprudence, and most extremely, limiting the discretion of states in citizenship laws.⁸⁵ As private life must be defined broadly,⁸⁶ the scope to which this ruling may apply is broad. Vlieks suggests that statelessness fits this criterion,⁸⁷ and Van Waas points out that the broad statement and expansive meanings of all these terms allow a wide margin of discretion for the ECtHR.⁸⁸

This then leaves the potential for the Court to explicitly argue that being de facto stateless leads to a breach of Article 8. As Waas pointed out, the terms are broad, it is not outside the realms of possibility to argue that refusal of residency status can affect social

⁸¹ See R. de Groot, and O. Vonk, ‘Nationality, Statelessness and ECHR’s Article 8: Comments on *Genovese v. Malta*’, (2012), *European Journal of Migration and Law*, 14, pp. 317-325.

⁸² *Genovese* [33].

⁸³ *Genovese* [33], also see *Mennesson v. France* [2014] ECtHR, Application no. 65192/11 and *Labassee v. France* [2014], ECtHR, Application no. 65941/11.

⁸⁴ S. Köhn, ‘ECHR and citizenship: The case of *Genovese v. Malta*’, (11 October 2011), *European Network on Statelessness*, Blog, <http://www.statelessness.eu/blog/echr-and-citizenship-case-genovese-v-malta> [accessed 24 March 2016].

⁸⁵ J. Bialosky, ‘Regional Protection of the Right to a Nationality’, (2015), *Cardozo Journal of International and Comparative Law*, Vol. 24, p. 180.

⁸⁶ *Niemietz v Germany*, [1992], ECtHR, Application no. 72/1991/324/396.

⁸⁷ Vlieks, ‘Human Rights Obligation’, p. 19.

⁸⁸ L. Van Waas, ‘Rottmann and *Genovese*: How will Europe’s nationality laws stand up to the scrutiny of its regional courts?’, (12 March 2012), *Tilberg University*, Weblog Stateless programme, <http://statelessprog.blogspot.co.uk/2012/03/rottman-and-genovese-how-will-europes.html> [accessed 24 March 2016].

identity as it can lead to feelings of humiliating exclusion.⁸⁹ Similarly the lack of comparative access to the same rights nationals possess can also be a question for discussion, as this can be seen as an active form of discrimination,⁹⁰ leading to an effect on the refused asylum seekers Article 8 rights, allowing similar grounds to *Genovese*.

However, this is optimistic. As Sir Burnton in *Abdullah* argues, Article 8 may give rights *somewhere*, but not always *here*; ‘I reject the submission that because the Secretary of State... [was] unable to enforce the return of the Appellant to Saudi Arabia, Article 8 required her to grant him leave to remain. Article 8 does not confer a right to reside in the country of one's choice.’⁹¹ This was said after the *Genovese* case, suggesting the UK Court had considered its effects. Similarly, the ECtHR case of *Petropavlovskis v Latvia* discussed Article 8 and citizenship, and qualified its role towards nationality.⁹² It made it explicitly clear that despite the *Genovese* judgement, there is no right to a specific nationality,⁹³ and that domestic law, provided it is not arbitrary, has the final say on nationality.⁹⁴

But Sir Burnton's views can be critiqued. If a refused asylum seeker lives in this country for a significant amount of time then ‘it is unreasonable to expect the applicant to put his life on hold and not to develop or deepen relationships whilst he remains here.’⁹⁵ Thus one's private life is engaged, and if this is the case then one's de facto statelessness should be taken into account as a factor of this. Although *Petropavlovskis* attempts to put Article 8 ‘back in the box’ somewhat, as this work has already suggested, UK case law is influenced by ECtHR decisions, suggesting that *Genovese* should not be so easily dismissed. Instead Article 8 must apply for a de facto stateless person as one's social identity is almost entirely based around the status one has and the refusal one has received. As the lack of citizenship has also led to deprivation within the UK it seems odd to suggest that the country where one has built up a private life should not be considered as the State to which leave to remain should be considered. Thus Article 8 rights *have* to apply here as they cannot be applicable elsewhere. A factor in this decision may be the length of time the individual has spent in the country, an aspect the next case will help with.

2.1.3: *Kuric and others v Slovenia*

This case concerned those who had their nationality ‘erased’ by the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) and subsequent failure to register as a citizen with the State that took its place (Slovenia).⁹⁶ The individuals, being born in another State, did not take the chance to register citizens in the new State they currently lived in, and so were not seen as citizens but as illegal immigrants and who could not change this status. Crucially this case involved those who were considered de jure stateless, and those seen as de facto stateless. A

⁸⁹ See A. Margalit, *The Decent Society*, (Harvard University Press, 1998), and R. Sales, ‘The deserving and undeserving? Refugees, Asylum Seekers and Welfare in Britain’, (2002), *Critical Social Policy*, Vol. 22, pp. 456-478.

⁹⁰ See BMENational and the Chartered Institute of Housing, ‘Advising people who are destitute’, *Housing Rights*, <http://www.housing-rights.info/advising-people-who-are-destitute.php#social-care> [accessed 24 March 2016], for housing benefits in particular.

⁹¹ *Abdullah*, [19].

⁹² *Petropavlovskis v Latvia*, [2015], ECtHR, Application no. 44230/06.

⁹³ *Ibid* [83].

⁹⁴ *Ibid* [84].

⁹⁵ *E B Kosovo v Secretary of State for the Home Department*, [2008] UKHL 41, [Lord Brown] [37].

⁹⁶ ‘Erased’ means ‘The applicants were left stateless after the dissolution of the Yugoslavia and later had their records removed from the civil registry, losing their right to residence’, see European Network on Statelessness, *Kuric and Others v. Slovenia* (2012), (June 2012), <http://www.statelessness.eu/resources/kuric-and-others-v-slovenia-2012> [accessed 18 April 2016].

State no longer existing is a cause of de jure statelessness, and those who were considered stateless fell into this category. However, SFRY was a collection of what are now modern States and there was free movement between such areas during the existence of SFRY. But after the State ceased to exist, some individuals who were not of Slovenian nationality were living in the new State of Slovenia. The crux of the issue was that both the de jure stateless and non-de jure stateless in this case did not register for citizenship under the Aliens Act 1991,⁹⁷ they were thus not considered nationals and did not have access to State facilities such as housing. The Court stayed away from acknowledging those who were de facto stateless as some could, in theory, register for a nationality in their 'home' country,⁹⁸ a State that did not exist at the time they moved to Slovenia. All the applicants in this case were refused permanent residence and it was found that their private and family life were affected, breaching Article 8.

Focusing on those not considered de jure stateless, we can see the Court has awarded residency to those who do not meet the requirements for statelessness in law. They had another nationality, and in some cases were deported to their 'home' State, which did not exist at the time they entered what is now Slovenia.⁹⁹ Whilst acknowledging that States can control individuals' entry the Court stated that 'measures restricting the right to reside in a country may, in certain cases, entail a violation of Article 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned.'¹⁰⁰ Being de facto stateless fits such a criteria, as both the denial of Slovenian nationality, and the consequences of that denial, breached Article 8. It can be observed they had no effective nationality in this time, and so they were de facto stateless because of this denial of nationality.

The judgement also highlighted that the State's failure to correct the 'erasure' for twenty years contributed to the violation of Article 8, as it left the applicants de facto stateless for a longer period.¹⁰¹ In this time the applicants could not live a normal life, hence the breach of Article 8. The group studied in this work also suffer a difficulty in being able to live a private life, as they have limited economic and social rights.¹⁰²

This ruling suggests that the enjoyment of private life is impeded whilst being de facto stateless, suggesting at least one current UK procedure around the grounds of private life is incorrect. Under UK law, one way to achieve leave to remain status on the grounds of private life is to have been living continuously in the UK for a period of 20 years.¹⁰³ According to *Kuric*, being de facto stateless impedes the enjoyment of an Article 8 right, but in the UK, if a de facto stateless person enjoys twenty years stay, they have proven they have a private life and hence they will have residency. This is contradictory, a de facto stateless person's private life is impeded by being de facto stateless, thus they cannot be expected to establish one for twenty years. This implies that current UK law conflicts with ECHR decisions and does not give the weight to private life that the ECtHR does.

⁹⁷ Aliens Act, 1991

⁹⁸ *Kuric* [330].

⁹⁹ *Ibid* [34].

¹⁰⁰ *Ibid* [355].

¹⁰¹ *Ibid* [319].

¹⁰² *Ibid* [227].

¹⁰³ Immigration Rules, s. 276ADE(1)(iii).

One reason for such an inconsistency in *Kuric* is that awarding citizenship is a contentious area, where the courts appreciate the State's sovereignty,¹⁰⁴ and yet are seeking to protect those most vulnerable. However it is interesting to note that this protection extends to such a degree that the 'Margin of Appreciation', which allows more State discretion in the application of ECHR rights, was not extended in this case, instead the court prioritised the rights of the de facto stateless.¹⁰⁵ This suggests future ECtHR uniformity in the way de facto stateless people are protected as there would be less national variation. *Kudric* has been seen as a 'pilot' case, a method to restructure systematic violations of Articles, in this case around citizenship.¹⁰⁶ The Court seems to be implicitly protecting de facto stateless people by suggesting their Article 8 rights have been breached. This is also evidenced by the language used, at one point using the classic Arendt phrase 'right to have rights'.¹⁰⁷

However, it must be noted that the breach in this case was largely an administrative one, (both the Aliens Act and Legal Status Act 1999 failure to correct the 'erasure' of these applicants),¹⁰⁸ the failure in the law had led to these applicants living in a 'legal limbo,'¹⁰⁹ (a descriptive term rather than the UK legal argument that will be developed in the next section). Applying this to refused asylum seekers, it can be claimed that the UK has no such administrative errors-the statelessness procedure is seen as a due process. So if one is not found de jure stateless under this process then they have no legal residency claim, and a state has the power to deport as part of a regulatory power to control its borders. It is simply a question of when it is safe to do so.

Although the refusal of de jure statelessness does not immediately create de facto statelessness, there is still a vast group that can fall into this category- as suggested in the definition section, de facto statelessness can occur in a multitude of ways. Similarly, although the Court did correct a legal mistake, it also focused on the effects of this action, and it can be argued that the effects of this de facto statelessness is analogous to refused asylum seekers.

For the applicants in *Kuric* they were refused their residency and threatened with and eventually deported to, a State they argued they did not belong to.¹¹⁰ For the groups studied in this work, deportation often relies on compliance with the removal,¹¹¹ leading many to stay in the UK, in a state of deprivation for significant amounts of time.¹¹² Arguably for both groups the effect is the same, the denial of rights, leading to the interference of their Article 8 rights. To have rights pending their removal may satisfy their Article 8 rights, although there is debate that even with such rights, being in a state of anticipation for such a long period may breach

¹⁰⁴ *Kuric* [351-3], the court found the laws themselves were pursuing a legitimate aim as they allowed control over entry and residence into the State.

¹⁰⁵ *Kuric* [387], the Margin of Appreciation is 'the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the ECHR', S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, (2000, Council of Europe), p. 5.

¹⁰⁶ A. Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts', (2015), *The Yale Journal of International Law*, Vol. 40, p. 18.

¹⁰⁷ *Kuric* [319].

¹⁰⁸ *Ibid* [58-60].

¹⁰⁹ *Ibid* [302].

¹¹⁰ *Kuric* [126].

¹¹¹ J. Sweeney, 'The Human Rights of Failed Asylum Seekers in the United Kingdom', (2008), *Public Law*, p. 281.

¹¹² See Lord Bishop of Newcastle, Hansard, HL, Vol 693, Col GC289, (12 July 2007), who pointed out 'We are committing hundreds of thousands of people to destitution for the next 14 years. What do we think we are doing?'

other rights.¹¹³ This interpretation allows the effect of *Karashev*, the appreciation of consequences for a lack of nationality, to be observed, and is a realistic comparison between the applicants in *Kuric*, and the groups studied in this work. Both groups cannot (or could not) claim residency and argue against their deportation. Similarly, an expansive application of Article 8 is in line with the *Genovese* judgement, although not published at the time of this case. Despite the UK statelessness procedure, being de facto stateless means you cannot enjoy a private life. Thus this is in breach of Article 8.

2.2: The European Court of Justice

The ECJ tries to enable the uniformity of European law in its jurisdiction. Under Article 267 of the Treaty of the Functioning of the European Union (TFEU),¹¹⁴ the Court can have preliminary rulings for the interpretation of treaties and acts of bodies or agencies of the EU. Although interpretation does not mean application, some Court decisions have had such an effect,¹¹⁵ and despite having jurisdiction over Union laws not national ones, the Court has looked at national laws that impact upon Union legislation.¹¹⁶ Thus this Court can have a large impact and its decisions encourage uniformity, suggesting that the rulings are de facto binding or else the State may be at fault in later cases.¹¹⁷

2.2.1: *Rottmann*

This case concerned stripping German nationality from an individual who obtained it by deception, and whether this was allowed under Article 20 of the TFEU,¹¹⁸ which endows nationals with citizenship of the Union.¹¹⁹ It held that depriving one of nationality was legal, and in tune with international law, as long as it was proportionate to the gravity of the offence and the consequences of de-nationalisation.¹²⁰ In this case as he had acquired such nationality by deception this was proportional.¹²¹ Despite the fact the Court also held that it was for national courts to determine nationality deprivation, it gave precedent for domestic Courts to use European legal principles, including proportionality and non-discrimination, suggesting that the Court in future may ‘test nationality laws against key EU principles’.¹²² This development pushes EU law to the brink of a revolutionary concept, effective EU citizenship that is taken seriously by all Member States.¹²³

It is important to stress that the effects of the proportionality test when used in conjunction with the above suggested breaches in ECtHR rules, along with ECJ rulings which also uses the proportionality test, may create an argument that the creating of de facto stateless peoples may be disproportionate to the State legitimate aim of border control. The causing of de facto statelessness can be caused by the refusal of asylum or humanitarian protection to applicants who then cannot be deported, meaning they are in a state of limbo.

¹¹³ See C. Vlieks, ‘A European Human Rights Obligation for Statelessness?’, p. 20 for a discussion on the case of *Kurt v Turkey* [1998], ECtHR, Application No 24276/94.

¹¹⁴ Article 267, TFEU.

¹¹⁵ *Stoke on Trent City Council v B&Q Plc*, [1993], ECJ (C-169/91).

¹¹⁶ *Grad v Finanzamt Traunstein* [1970] ECJ, (9/70).

¹¹⁷ See R. Flamini, ‘Judicial Reach: The Ever-Expanding European Court of Justice’, (12 November 2012), *World Affairs*, Winter Edition, <http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice> [accessed 25 March 2016].

¹¹⁸ Article 20, TFEU.

¹¹⁹ *Rottmann*, [4].

¹²⁰ *Ibid* [55-6].

¹²¹ *Ibid* [57].

¹²² L. Van Waas, ‘Rottmann and Genovese’, para 4.

¹²³ D. Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’, (2013) *European Law Journal*, Vol.19(4), p. 503.

Proportionality has been said to be the ‘manifestation of the perennial quest to invest adjudication with precision and objectivity,’¹²⁴ by its system of assessing whether the measure by a State had a legitimate aim, suitable to achieve the aim, was necessary to achieve the aim and if the measure was reasonable.¹²⁵ These individuals have been *made* to be de facto stateless (as will be discussed below) and this may be disproportionate to the aim of national security, as creating de facto stateless individuals does not further this aim, as they may be then harder to detain.

In this case it was proportionate to withdraw nationality, partly because he would not be stateless as he held another nationality.¹²⁶ In *Kuric* the State measures were not in accordance with the law as they were found to have ‘lacked the requisite standards of foreseeability and accessibility’,¹²⁷ it did pursue a legitimate aim in creating citizenship,¹²⁸ but was not ‘necessary’ as the inability to obtain valid residence violated the positive obligation for the State to ensure that ‘failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the ‘erased’.¹²⁹ Thus proportionality can suggest that nationality policies are invalid, in *Kuric* for instance due to ineffectual laws. However, if all the above points are brought together in one proportionality test, an argument can be made that the UK’s stateless procedure is disproportionate to the breach of Article 8 rights of de facto stateless persons.

It can be assumed that the UK measure of refusing full rights to de facto stateless persons would pass the ‘legitimate’ aim marker, as controlling borders and citizenship is often considered legitimate, as was the case in *Kuric*. Persons who are de facto stateless have passed through a system that has not found them eligible for residence or full protection. Thus they can be deported.

However, suitability may have an argument. The current system often leaves refused asylum seekers destitute for long periods of time due to inability to return, examples being Zimbabweans, Iranians, Iraqis, Sudanese, Afghans and Somalis, who cannot be deported due to documented violence or human rights violations.¹³⁰ Although control of borders is a legitimate aim, the inability to deport people means the current system of refusing full rights of residency whilst keeping individuals destitute within the country does not control the external borders, only the internal discriminatory borders.

The lack of suitability then adds arguments to the question of necessity. It may be necessary to deport an individual, but when that is not possible it is not necessary to deprive the person of rights. As suggested above, this lack of residency can violate Article 8 rights through the harm of social identity and the conditions in which one lives. The extent of the deprivation and violation of the Article 8 right then suggests this measure is unreasonable. Linking back to the start of this work the reasons for a destitution policy may have been due to the ‘self’ proving its intolerance to the ‘other’, reasoning which holds little weight in law.

¹²⁴ S. Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009), *International Journal of Constitutional Law*, 7,3 p. 469.

¹²⁵ P Craig and G de Burca, *EU Law* (5th edn, Oxford University Press, 2011) p. 526.

¹²⁶ *Rottmann* [34].

¹²⁷ *Kuric* [346].

¹²⁸ *Ibid* [353].

¹²⁹ *Ibid* [359].

¹³⁰ Still Human still Here, *Briefing paper on destitute refused asylum seekers*, (2009), Resources, <https://stillhumanstillhere.wordpress.com/resources/> [accessed 25 March 2015], p. 1.

Thus an argument can be made that the UK measure of deprivation of rights is disproportionate in its effect of destitution which is extreme enough to violate Article 8. As domestic cases are influenced by ECtHR and ECJ law, if accepted, this argument is increasingly persuasive.

3. The Limbo Argument in Domestic Law

This section will now explore how to apply the above protection for de facto stateless peoples through the limbo argument, and then answer criticisms to this argument. The limbo argument has close correlations with the arguments given in favour of protecting de facto stateless people, despite never mentioning the term ‘de facto stateless’. However, as has previously been mentioned, as there has been no study whatsoever on this argument, it must fall to this work to show the very close link between the limbo argument and the protection offered to de facto stateless people, and thus exemplify how the limbo argument can be the domestic application of the above ECtHR rulings. It relies on the view that refused asylum seekers in limbo have effectively lost their nationality. They are then de facto stateless, and thus have the protection outlined above.

3.1 How the Limbo Argument may operate

This is a topic worthy of another essay in its scope and practice. However, this work will sketch out how the limbo argument would work, how it would incorporate the above protection of Article 8, and then will answer criticisms of this view.

First of all, we must summarise the protection the ECtHR is presumably offering. Under *Kuric*, and the older cases *Karassev* and *Slivenko*, we can see that the effects of being de facto stateless can be an infringement of Article 8. If we then apply *Genovese* we can see that the denial of nationality is also an Article 8 infringement. Finally, if we follow *Rottman* (ECJ) proportionality should apply domestically,¹³¹ and it should be questioned whether the denial of rights to those who are already within the country is proportionate to the legitimate aim of boarder control.

Applying these cases to refused asylum seekers; first, we can see that they are destitute and unable to be deported. This suggests they are under the *Kuric* principles, their private life have been interfered with.

Secondly, they have also claimed refugee status, but this has been denied. However, as they cannot be deported (due to the risk that their home State will breach their human rights), their original nationality is limited in the rights it will allow the individual to access. That nationality would not bring them rights or equal treatment (to UK nationals), it would only allow them to voluntary return (an issue that will be dealt with later).¹³² As for many this is not an option they want to consider,¹³³ their nationality is not effective. Thus an argument can be made that by placing them into a position where they will become de facto stateless, the UK is denying them their effective nationality. Their old one is ineffective, but they cannot claim a UK one. This would bring them within the *Genovese* argument.

¹³¹ European Commission, ‘Summary of C-135/08 Janko Rottmann v Freistaat Bayern, judgment of 2 March 2010’, (2010), *Summaries of Important Judgements*, http://ec.europa.eu/dgs/legal_service/arrets/08c135_en.pdf [accessed 15 April 2016], para 6.

¹³² Or ‘Assisted Voluntary Return’, where the UK government give some financial assistance and advice for those who entered the UK illegally and wish to return to their home country, see Gov.uk, *Return home voluntarily if you're in the UK illegally*, <https://www.gov.uk/return-home-voluntarily/who-can-get-help> [accessed 15 April 2016].

¹³³ Often due to security considerations in their home country see R. Black et al, ‘Understanding voluntary return’, (2004), *Home Office, Online Report* 50/04, <http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs04/rdsolr5004.pdf> [accessed 15 April 2016], pp.14-6.

Thirdly, there is the final stage, proportionality. As suggested above, it may be deemed disproportionate to not allow rights to those de facto stateless who have passed the border. There is no legitimate aim apart from to ensure that they do not have full access to State rights, a policy partly followed due to concerns of a ‘pull factor’, that is the conditions enjoyed by these migrants would encourage other migrants, a view flawed by lack of evidence (to be discussed in the next section). Although they may not be entitled to UK nationality, it would be proportionate that they should be given leave to remain, until they can be safely deported, then they can make a contribution to society in the time they remain in the UK. Of course such deportation would still be distressing, and the increased amount of time such people have lived in the UK for, and with increased rights, may enforce their Article 8 rights, making deportation more difficult. However this is a topic for another study.

We can now suggest how the limbo argument would take effect. As stated at the start of this work, those who are de facto stateless should be given leave to remain. This would allow them the right to work, to housing benefits and to further education loans, all of which would allow them to make a contribution to society. It would not give them a right to nationality, as being a British citizen would mean they would not be able to be deported if and when it is safe to do so.

The question is, how does one determine whether the key part of this argument ‘no reasonable likelihood of return’ is determined? There is no easy answer to this, and no way to suggest that being destitute somehow ‘qualifies’ one to be given leave to remain as if this were ‘proof’ of the inability to deport. Ideally it would be realised at the last asylum refusal that there is little way to deport a refused asylum seeker in these cases, and thus offer them leave to remain. There has already been mention of some of the countries where the State is currently unable to deport to. It would thus be ideal that if refused asylum, but coming from a place where there is no immediate allowance for deportation, the individual is given leave to remain. This leave to remain could then last weeks or years, but it would stop destitution for this period.

However, there are legal criticisms against the limbo argument, as well as competing existing legal policies. These will now be examined and the limbo argument justified.

3.2: Voluntary Return

Perhaps the most obvious answer against the idea that de facto stateless peoples who cannot be returned should be given protection, is that, for some of them, voluntary return is an option. This return may not be to their home within the State, but would certainly be in the State itself.¹³⁴

To give a better example of this, the State of Zimbabwe can be used. A Shona political asylum seeker, who has been refused, cannot be deported back into the Western areas of that State even if that is where their home was, as they may face discrimination,¹³⁵ and attract adverse attention due to their political persuasion.¹³⁶ Instead they can be internally re-located to cities such as Harare or Bulawayo.¹³⁷ Specific arguments can be made to refute this, for instance that the economic situation in Harare is enough to amount to deporting someone back

¹³⁴ See J. Brokenshire *Hansard*, Written question – 3447, (22 June 2015), for ‘Internal Relocation’.

¹³⁵ Home Office, ‘Country Information and Guidance Zimbabwe: Political Opposition to ZANU-PF’ (October 2014), para 1.3.22.

¹³⁶ *RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department*, [2012] UKSC 38, [16], (Lord Dyson).

¹³⁷ Home Office, ‘Country Information and Guidance Zimbabwe’, p. 42.

to destitution, but these are arguments for an asylum case and will not be developed here. The point remains that the individual can choose to end their destitution, and have full rights of their nationality, in their home country.

Similar themes are reflected through UK law, for instance that there is no obligation to provide mental health support for destitute asylum seekers if such mental health was brought about by the destitution.¹³⁸ The reason for this is that the destitution was voluntarily entered into so the State has no further responsibility.

Such examples are within a wider strategy of the UK state using destitution as a strategy to both deter new arrivals and to minimise costs to the State (the feasibility of both strategies will be discussed in the next section).¹³⁹ Although this is not explicit in legislation, the above mental health provisions for instance is enough that the Courts cannot over-rule such arguments. Thus there should be no limbo argument when the applicant can quite easily remove themselves from such limbo.

However, very few refused asylum seekers choose voluntary return as they fear the situation in their home country.¹⁴⁰ Although the courts in this country may have deemed their application inadmissible that does not change the perception of fear, a fear so strong they would rather stay in the destitution the UK government has enforced. As voluntary return is obviously voluntary, this then means the State must be able to forcibly return applicants, and to do that the State must ensure that where they will be returned to is safe.

If we turn back to the Zimbabwean example, an applicant could be deported and be forcibly relocated. However, this would bring them to the attention of the authorities, would expose the individual's reason for leaving the State (political) and immediately mean they are identifiable and at risk. Thus they cannot be deported as they may be at risk of an Article 3 ECHR violation, and the UK has to wait until it is safe to return Zimbabweans to Zimbabwe generally, or suggest they return by themselves and re-locate. But if the individual refuses to do one, and the State cannot do the other, the destitution remains.

This then is the crucial fact. The applicant may have chosen the destitution over presumed persecution, but it is still destitution, and with their lack of rights there is no way to end such destitution. This destitution continues to violate their Article 8 rights, and causes costs to the community as well.¹⁴¹ Thus they remain de facto stateless, and the UK ignores reality and continues its rhetoric about destitution being a choice.

3.3: Current Procedure

There are resemblances of the limbo argument in current law. An example of this is in the 'Enforcement Instructions and Guidance', which has an 'exceptional circumstances' application for non-removal,¹⁴² one of which is 'length of time accrued in the UK outside of

¹³⁸ See H. Dumper, R. Malfait and N. Scott-Flynn, Mental Health, 'Destitution and Asylum-Seekers: A study of destitute asylum-seekers in the dispersal areas of the South East of England', (2006), *Care Services Improvement Partnership*, <https://emosandcrane.co.uk/resources/CSIP%20-%20Mental%20health%20destitution%20and%20asylum-seekers.pdf> [accessed 15 April 2016], pp.16-8.

¹³⁹ See N. Fancott and S. York, 'Enforced destitution: impediments to return and access section 4 "hard cases" support', (2008), *Journal of Immigration Asylum and Nationality Law*.

¹⁴⁰ R. Black et al, 'Understanding voluntary return', (2004), pp.16-8.

¹⁴¹ British Red Cross and Boaz Trust, 'A decade of destitution: Time to make a change', (2013), p.5.

¹⁴² Enforcement instructions and guidance, 2012, s. 53.

migrant's control', a factor of which is the practical likelihood of removal.¹⁴³ In theory this sounds like the limbo argument.

However, in practice this 'exceptional circumstance' is made extremely exceptional by the fact that the applicant has to make a 'genuine effort' to secure voluntary departure.¹⁴⁴ As set out above, most refused asylum seekers would not make such an application precisely because they do not want to return. There are also 'stalemate' situations, such as the Zimbabwean example above, where voluntary return is possible in certain circumstances, but deportations would not be allowed. Thus the applicant would spend time in the UK which is outside of their control (as return may mean persecution, which is then outside of their control).

This then means people are still destitute, and one only has to look at the numbers of destitute refused asylum seekers to see that this 'exceptional circumstance' is too exceptional. As well as this, the arguments outlined above show that being destitute limits the enjoyment of one's Article 8 and Article 3 rights.¹⁴⁵ So this is a limited form of the limbo argument, which does not do enough to help refused asylum seekers.

3.4: Abdullah

This case concerned a similar applicant to *Kuric*. It involved an applicant from a disputed origin, who argued he was stateless and so must be given nationality in this country.¹⁴⁶ The Court of Appeal responded that although he was entitled to his Article 8 rights, he was not so here.¹⁴⁷

This case also went onto examine the limbo argument as well as some of the cases discussed above. In declaring the limbo argument to be premature,¹⁴⁸ Lord Burton claimed this case was different from *Kuric* by pointing out that the 'erasure' the applicants in that case endured was not a result of their own doing, whilst in this case the applicant chose to come to the UK and endure their de facto statelessness.¹⁴⁹

This is perhaps a blinkered view. There are of course large differences between the two cases. In *Kuric* the applicants were in the State much longer than the individuals discussed in this work. They also entered their current host State when it was legal to do, but were seen as illegal entrants due to faults in the law. However, as suggested, the ECtHR recognised the *effects* of de facto statelessness and not just the manner in which one found themselves to be in this position. As set out above, the two sets of applicants were both deprived of their Article 8 rights, thus there are clear similarities between the two cases. Furthermore, it can be added that originally the applicants did not *choose* destitution, but protection. The State is choosing destitution for the applicants.

There is also the question of the fact that the occupants in *Kuric* came to their host State legally. However, this seems like a null point. To claim asylum, one may travel in any way possible, including forgery or illegally crossing a border.¹⁵⁰ Once asylum is requested in the

¹⁴³ *Ibid* s.53(iii).

¹⁴⁴ *Ibid*.

¹⁴⁵ See *M.S.S. v. Belgium and Greece*, [2011] ECtHR, Application no. 30696/09, pp.48-53.

¹⁴⁶ *Abdullah*, [2-14], (Burnton).

¹⁴⁷ *Ibid*, [27], (Beatson).

¹⁴⁸ *Ibid*, [28], (Beatson).

¹⁴⁹ *Ibid*, [20], (Burton).

¹⁵⁰ Convention relating to the status of Refugees, Article 31.

host State there are procedural requirements that are triggered. Thus it can be seen that the individuals came here legally, but by being refused they are staying here illegally, a problem that can be resolved by allowing their living in the host state.

3.5: Destitution Protection

There may be arguments that instead of suggesting de facto stateless people should be allowed leave to remain, they should simply be given protection from destitution. This would perhaps be a simpler argument. There have already been calls to end this destitution,¹⁵¹ and the Joint Committee on Human Rights has suggested the UK may be in breach of its obligations by allowing such destitution to occur.¹⁵² So instead of giving leave to remain, perhaps the rights given to asylum seekers waiting to hear a decision should be extended to those de facto stateless- that is, housing benefits and financial assistance.¹⁵³

This would be an easier goal to achieve, and make sure that those who have been refused asylum are not given greater rights than those still waiting for their decision to be made on their asylum status. This would ensure that the system remains fair for those who need it most.

But this work contends that instead of increasing rights to the level of asylum seekers, both groups should be given leave to remain or something akin to it. Although they may be waiting for a decision on their application, there seems little reason why asylum seekers could not also contribute to society by having something similar to leave to remain until that decision is made. This would not harm the decision making process but would allow them to escape near destitution, as the current system forces on them. Instead both groups could have a more expansive Article 8 right by having the right to work, or for education for instance, attributes that amount to living rather than just life. It must also be noted that some de facto stateless people are in employment under the current system illegally, meaning they are vulnerable to exploitation.¹⁵⁴ Allowing leave to remain would limit such exploitation.

However, this leads to a separate point. Asylum seekers and refused asylum seekers are different categories of people. Some refused asylum seekers cannot be deported, as they may be in the UK indefinitely, they should be able to make a contribution to society as this would allow them to fulfil their Article 8 rights. For asylum seekers, their presence in the UK may be very brief, as they may be deported if their claim fails. This does not detract from the argument that they should be given something similar to leave to remain in order to contribute to society, but the fact that their limbo has a clear end-point makes for two different cases.

3.6: The longer they stay the more Article 8 rights they get

This is an argument based around the fact that there is an acknowledged public policy good in reducing the number of asylum seekers, limiting immigration and carrying out deportations.¹⁵⁵

¹⁵¹ Lord Roberts, *Hansard*, HL, Vol. 752, Col. 22, (17 March 2014).

¹⁵² House of Lords, House of Commons, Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, (Tenth Report of Session 2006–07), HL Paper 81-I, HC 60-I, para 120.

¹⁵³ See M. Gower, 'Asylum support': accommodation and financial support for asylum seekers', (2015), *House of Commons Library*, Briefing Paper, Number 1909, [file:///C:/Users/Nick/Downloads/SN01909%20\(1\).pdf](file:///C:/Users/Nick/Downloads/SN01909%20(1).pdf) [accessed 15 April 2016].

¹⁵⁴ H. Crawley, J. Hemmings and N. Price, 'Coping with Destitution Survival and livelihood strategies of refused asylum seekers living in the UK' pp. 45-8 and M. Gower, 'Should asylum seekers have unrestricted rights to work in the UK?', (2016), *House of Commons Library*, Briefing Paper, No. 1908, <file:///C:/Users/Nick/Downloads/SN01908.pdf> [accessed 15 April 2016].

¹⁵⁵ See Immigration Rules, Part 13, s.396.

The current system ignores the destitution of refused asylum seekers and deports them when necessary. This then ignores the Article 8 rights they have, unless it is very clear ones such as family life demonstrated through being a parent.¹⁵⁶ If the system proposed in this work was to occur, many more Article 8 rights would be seen for destitute asylum seekers. This would increase the population of immigrants, not decrease it, as is the public good argument.

This is perhaps a blunt and distasteful argument for many. However, it is clear within the Conservative manifesto to reduce the number of immigrants,¹⁵⁷ and there has been rhetoric about having a more ‘controlled’ asylum system.¹⁵⁸ As this party are currently in power, it can be suggested that reducing the number of asylum seeker claims and rights are a democratic policy. Allowing these suggestions in this paper would be another example of the ECtHR ignoring domestic wants, and effective ‘human rights imperialism’.¹⁵⁹

Indeed, following the cases set in this paper would increase the Article 8 rights for refused asylum seekers. However, it does not automatically mean they will have a right to stay if the country they are to be deported to is now safe. Instead it means that they have to argue their case, as many immigrants do. Leave to remain does not automatically grant citizenship for all those destitute, it simply offers an easement to the position they have found themselves in.

The argument around the public good is also a valid one, however it is also in the public good to follow the law.¹⁶⁰ As set out, the ECtHR does not have an automatic effect on the UK, but it is usually followed. To follow it means a consistent set of human rights laws across those who are signatories to the ECtHR. It may be in the government’s interests to reduce immigration numbers, but the preservation of the law is of a higher order of importance. Another theoretical point can be added that rights are anti-majoritarian in character,¹⁶¹ allowing individual needs to be prioritised against the will of the majority, thus stopping a ‘tyranny of the majority’.¹⁶² Thus allowing the limbo argument would be the fulfilment of rights obligations, furthering the rule of law and allowing those who are de facto stateless to make contribution to society, a point that will be analysed in the next section.

¹⁵⁶ *Ibid*, s.400.

¹⁵⁷ Conservative Party, *The Conservative Party Manifesto*, (2015), <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> [accessed 15 April 2015], p. 30.

¹⁵⁸ See T., May, ‘A Beacon of Hope’, (06 October 2015), *Conservatives*, <http://press.conservatives.com/post/130940020830/theresa-may-speech-a-beacon-of-hope> [accessed 15 April 2016] and A., Travis, ‘Theresa May criticised for ‘compassion quota’ in asylum strategy’, (27 February 2016), *Guardian*, <https://www.theguardian.com/uk-news/2016/feb/27/theresa-may-criticised-for-compassion-quota-in-asylum-strategy> [accessed 15 April 2016].

¹⁵⁹ Lord Dyson, ‘The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?’ (30 January 2014), *University of Essex*, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> [accessed 14 April 2016], p. 2.

¹⁶⁰ Can be seen as the rule of law, see P. Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A response to Lord Irvine’, (2012) 2 *Public Law*, p. 263.

¹⁶¹ T. Campbell, A. Sarah., A. Stone., *Protecting Human Rights: Instruments and Institutions*, (Oxford University Press, 2003), p.137.

¹⁶² J.S. Mill, *On Liberty*, (Batoche Books, 2001), p. 9.

4. Policy Arguments

The policy arguments against the implementations of the above legal proposals are perhaps the biggest barrier. In the current political climate, immigrants are seen negatively in the UK,¹⁶³ linking in with the theoretical analysis in this work; if asylum seekers are seen as the ‘other’, and as a ‘free rider’ on communal systems,¹⁶⁴ then there will be less enthusiasm to allow them equal rights. However, the current climate of destitution and the refusal to allow that destitution to end means that refused asylum seekers are kept in a right-less state, and not allowed to be able to contribute to society, and are thus kept as an ‘other’. This section will critique the policy arguments against refused asylum seekers having leave to remain and suggest that the benefits of allowing this would far outweigh any negative ramifications.

4.1: The Pull factor

This is the greatest policy argument against giving refused asylum seekers greater rights. The argument stems from the view that more asylum seekers coming to the UK is a negative aspect, then argues that giving greater rights to refused asylum seekers will encourage more asylum seekers to come to the UK.¹⁶⁵ Thus the current system must be kept as harsh as possible to dissuade future arrivals, and encourage current ones to return to their home State.

However, this is a critical misunderstanding of the current system. Most asylum seekers are intent upon being within the European Union rather than the UK specifically,¹⁶⁶ and often the smuggler has the greatest influence, if not direct decision, over which country to go to.¹⁶⁷ Often those that do choose to come to the UK do so because of family members or past colonial ties.¹⁶⁸ Few have heard of benefits, or even the difficulties of benefitting from asylum policies,¹⁶⁹ indeed one study has shown that the main knowledge migrants had of the UK was based around football.¹⁷⁰ Thus the idea of an ‘easy’ life in Britain as a pull factor can be critiqued firstly for lack of evidence, most know very little of the country. Secondly, it can be argued that ‘deterrents’ do not work in reducing asylum seekers as most do not choose to come to the UK, but simply want to flee persecution. As most know very little of the UK, they also know little of the deterrent policies.

Relating such an argument to this work, it would be intentionally cruel to allow current refused asylum seekers to be shown as an example of how harsh the UK is, as well as senseless. As these people cannot be deported with any particular speed there is no way they can be seen as an ‘example’ in their home State. But as this would do little to reduce the number of asylum seekers coming to the UK in any case, the idea of deterrence, and the destitution and lack of rights that this entails, seems ineffectual and abusive.

¹⁶³ See NatCen, *British Social Attitudes 2013: Attitudes to immigration*, (2013), <http://www.bsa.natcen.ac.uk/media/38108/immigration-bsa31.pdf>, [accessed 25 April 2016].

¹⁶⁴ See M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, (Harvard University Press, 1965) for further detail about the ‘free rider problem’.

¹⁶⁵ See E. Leigh, *Hansard*, HC, Vol 606, Col 1246-8, (4 March 2016).

¹⁶⁶ See J. Hagen-Zanker and R. Millet, ‘Can deterrent policies stop people coming to Europe?’, (23 March, 2016), *The Broker*, <http://www.thebrokeronline.eu/Blogs/Inclusive-Economy-Europe/Can-deterrent-policies-stop-people-coming-to-Europe> [accessed 29 April 2016].

¹⁶⁷ J. Morrison, *The Trafficking and Smuggling of Asylum-Seekers: The End Game in European Asylum Policy?*, (2000, UNHCR).

¹⁶⁸ H. Crawley, ‘Chance or choice? Understanding why asylum seekers come to the UK’, (2010), *Refugee Council*, <http://www.refugeecouncil.org.uk/assets/0001/5702/rcchance.pdf> [accessed 29 April 2016], p. 9.

¹⁶⁹ A. Gilbert, and K. Koser, ‘Coming to the UK: What do Asylum Seekers know about the UK before arrival?’, (2006), *Journal of Ethnic and Migration Studies*, Vol. 32, No. 7, p. 1209.

¹⁷⁰ H. Crawley, ‘Chance or choice?’ p. 9.

4.2: Free-rider

There are some arguments that allowing refused asylum seekers leave to remain would create a greater strain on communal resources, such as the welfare state.¹⁷¹ As such people have paid no income tax, they have contributed less to the communal benefits and yet may be benefitting more. This is against fundamental norms of fairness, potentially causing widespread dissatisfaction in society.¹⁷² It would also cost the State more money, depriving the citizens of the host State.

Again this argument can be critiqued by both the current ‘destitution system’ and the way the limbo argument would operate. The current system encourages free riding as the refused asylum seekers cannot contribute to the income taxes or employment of communal systems. They contribute to society as a whole in many other ways, for instance volunteering, but by the refusal to allow refused asylum seekers leave to remain, they are kept in the position of an ‘other’. So the free rider argument is only bolstered by current policies.

In contrast, if refused asylum seekers were given rights to employment or education, there is evidence that they could contribute more to their society than they would take away. Studies have suggested that Syrian refugees (who have the right to work) largely compete in sectors with other migrants.¹⁷³ This is a problem, as it can result in wage deflation in such areas of employment,¹⁷⁴ but arguably one that affects States which have taken far more migrants per population than the UK has, such as Lebanon. In general, migrants with a right to work have contributed more to their societies in acting as both entrepreneurs,¹⁷⁵ and as consumers.¹⁷⁶ Indeed even the most pessimistic of studies suggest that migrants with the right to work are neither a gain or a drain for society, suggesting that this group pays less income taxes, as they have less employment, but do not claim higher benefits than others.¹⁷⁷ Even on non-financial matters there is little drain on communal resources, for instance the wait for NHS appointments has largely been unaffected.¹⁷⁸ Indeed as some asylum seekers are highly educated, they may

¹⁷¹ G. Sheldrick, ‘Asylum bill hits £726,000 a day: Immigration policy is a ‘shambles’ say critics’, (March 2 2015), *The Express*, <http://www.express.co.uk/news/uk/561302/Asylum-seekers-cost-taxpayers-726k-day-immigration> [accessed 29 April 2016].

¹⁷² C. Runge, ‘Institutions and the Free Rider: The Assurance Problem in Collective Action’, (1984), *The Journal of Politics*, Vol. 46, No. 1, p. 154.

¹⁷³ See International Rescue Committee, *Economic Impacts of Syrian Refugees: Existing Research Review and Key Takeaways* (2015), <http://www.rescue.org/sites/default/files/resource-file/IRC%20Policy%20Brief%20Economic%20Impacts%20of%20Syrian%20Refugees%20.pdf> [accessed 25 April 2016], p.1.

¹⁷⁴ S. Marsi and I. Srour, ‘Assessment of the impact of Syrian refugees in Lebanon and their employment profile 2013’ (2014), *International Labour Organisation*, <http://www.voced.edu.au/content/ngv%3A70465> [accessed 28 April 2016], p. 10.

¹⁷⁵ S. Cagaptay, ‘The Impact of Syria’s Refugees on Southern Turkey’, (2014), *The Washington institute for near east Policy*, Policy Focus (130), pp 23-8.

¹⁷⁶ D. Carrion, ‘Syrian Refugees in Jordan Confronting Difficult Truths’ (2015), *Chatham House*, https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150921SyrianRefugeesCarrion.pdf [accessed 28 April 2016], p. 5.

¹⁷⁷ The Economist, *Boon or burden?* (June 15th 2013), <http://www.economist.com/news/finance-and-economics/21579482-new-study-shows-fiscal-impact-migration-broadly-neutral-boon-or> [accessed 28 April 2016].

¹⁷⁸ O. Giuntella, C. Nicodemo and C. Vargas-Silva, ‘Immigration may reduce the time you wait to see the doctor’, (October 13th 2015), *London School of Economics*, blog, <http://blogs.lse.ac.uk/politicsandpolicy/immigration-may-reduce-the-time-you-wait-to-see-the-doctor/#Authors> [accessed 28 April 2016].

be able to contribute to highly skilled industries or services such as the NHS or manufacturing.¹⁷⁹

To reduce destitution, there may however be a short-term increase in benefit- spending, as those now destitute would be eligible for housing. However, this may be offset by an increase in tax revenue, as stated above, and is linked to a wider argument about the lack of social housing in the UK,¹⁸⁰ which will not be discussed here. In any case, it can be seen that this is a short-term increase, as when such migrants have work they will no longer need such housing.

Another argument focuses around the refused asylum seekers have on their local communities. The current system already costs the local government (rather than the Home Office) expense when they have to support those who are not destitute in local authority housing.¹⁸¹ If refused asylum seekers could support themselves, then this cost would be reduced in the long-term. Also, at current large networks of charities, churches and friends who support those who are destitute also spend financial and human resources on supporting destitute asylum seekers. It is an abstract, but reasonable, argument to make that if destitute asylum seekers could support themselves, then such charities and churches would be free to able to contribute to society in other ways, that may not strictly be financial.

Thus, rather than being a free rider, allowing the limbo argument would allow a greater work-force, generate more resources in the local community and would save the government expense. Rather than costing the State money, allowing the limbo argument would save money.

4.3: Democratic Mandate

As eluded to in earlier parts of this work, the current government has encouraged the refusal of asylum seekers to be seen as in the public good, allowing deportation. Although destitution is not part of such a mandate, it can be seen that allowing refused asylum seekers almost equal rights to UK citizens may not be considered a 'public good' in a climate which does not favour immigrants and has voted in a government determined to remove more asylum seekers. To allow the limbo argument would go against these wishes.

As stated earlier, rights are essential to the workings of democracy, and this argument will not be discussed again. However, it is notable that although there may be a public good argument for deportation, this is not the same as destitution. There is little public good to this process for, as stated, there is little refused asylum seekers can do about this situation, it costs the community in which they live money, and it starves the State of greater human and financial resources. Also it must be noted that although there is a democratic mandate to admit less immigrants, refused asylum seekers are already here, they are simply in a state of limbo due to the inability to access the internal borders. Thus allowing the limbo argument does not harm this democratic mandate, and allows the community in which they were destitute, and the State itself, to have more workers and a higher income.

¹⁷⁹ Refugee Council, *Report shows the contribution asylum seekers make to the economy*, (15 June 2005), http://www.refugeecouncil.org.uk/latest/news/707_report_shows_the_contribution_asylum_seekers_make_to_the_economy [accessed 29 April 2016].

¹⁸⁰ See J. Richardson, 'Why the lack of adequate social housing in the UK is an important issue and how it may be solved', (7th October 2013), *London School of Economics*, blog, <http://blogs.lse.ac.uk/politicsandpolicy/36783/> [accessed 29 April 2016].

¹⁸¹ Local Government Organisation, *Immigration Bill Second Reading, House of Commons*, (13 October 2013), <http://www.local.gov.uk/documents/10180/5533246/131015+Immigration+Bill+-+HC+-+Second+Reading.pdf/31b74734-59f5-49a5-a8d1-457eabef2513> [accessed 29 April 2016].

This then links to a further theoretical argument about the health of democracy. By having policies focused on people who have no voice in how such policies will be shaped, the ideal of democracy is corrupted.¹⁸² This is further violated by the fact that such people, who are within the State, are limited in their voice, privileges and security,¹⁸³ and then have no opportunity to gain such attributes, ones that are at least given to subjects of a State.¹⁸⁴ Thus by having such laws we are damaging principles of equality, these principles are pivotal to democracy or other-wise we have a caste-like system that is not democracy at all.¹⁸⁵ Currently refused asylum seekers are not even eligible for the rights of subjects as they are liable for destitution, this is damaging for democracy, more so than ignoring the tyranny of the majority.

¹⁸² D. Miller, 'Immigrants, Nations, and Citizenship', (2008), *Journal of Political Philosophy*, Vol.16(4), p.380.

¹⁸³ M. Gibney, 'Who should be included? Non-citizens, conflict and the constitution of the citizenry' (2006), *CRISE*, Working Paper no. 17, p.7.

¹⁸⁴ M. Walzer, *Spheres of Justice*, (1983, Basic Books), p. 58.

¹⁸⁵ O. Fiss, 'The Immigrant as Pariah', (1October 1998), *Boston Review*, <http://bostonreview.net/forum/owen-fiss-immigrant-pariah> [accessed 29 April 2016].

Conclusion

Refused asylum seekers are in a state of limbo, unable to make a contribution to the society they have found themselves in. Although they have the option of voluntary return, many refuse to take such an action due to fears of persecution on return. Whether this be an unfounded fear or not, it creates a reality for some refused asylum seekers of destitution until their home State's political climate has become safer. As this can last years, refused asylum seekers remain without the rights of the citizens of the UK. Their old nationality no longer allows them the 'right to have rights', as if they return to their home country most of their rights will be lost to them if they are persecuted. At the same time they are refused rights in their host State. This makes them de facto stateless.

Being de facto stateless allows several arguments from the ECtHR and the ECJ to apply to them, namely the ruling that refusing de facto stateless people rights is disproportionate to the aim of border security. The effects of being right-less is an affront to the Article 8 of applicants as it creates considerable hardship. The UK has some laws around the Article 8 of de facto stateless people, but this is incompatible with ECtHR rulings as it requires a length of private life in the UK to qualify for leave to remain, however any time spent as a de facto stateless person infringes that private life, so waiting a period of twenty years is actually having ones Article 8 rights abused for that length of time.

The limbo argument allows the application of the ECtHR rulings in domestic law. After a speedy assessment of likelihood of deportation, the UK should instead allow leave to remain for those who would be de facto stateless, until the safety of their deportation can be assured. Although this would allow refused asylum seekers to build up further Article 8 rights and thus make a future case for staying in the host country, this is a natural consequence of many refused asylum seekers living in the UK in any case.

Although there are some arguments to improve the rights of de facto stateless people, the limbo argument is the best choice of action. The current procedures encourages voluntary return, something most refused asylum seekers will not contemplate, and does nothing to diminish the destitution they face, meaning it is a blinkered view of reality. Protecting refused asylum seekers against being destitute is a very notable aim but does not go far enough to allow refused asylum seekers to contribute to society, as the limbo argument does.

Finally the limbo argument can be seen as economically and politically viable, respecting democracy, but disallowing the state of destitution so many refused asylum seekers face. It is the best policy option for these people, and is a natural understanding of the law the ECtHR and the ECJ produces.

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